A He kept saying he was so drunk he didn't need anything.

Q I realize that. You didn't advise him of the rights?

A No, sir, I did not.

Q And you had the camera set up and this is a very brightly lighted room—as I understand it, you have got a whole string of neon lights across there?

A They are set in rows, yes.

Q For optimum pictures you have got to have much more light than you have in a normally lighted room?

A Yes, sir.

Q Of course, it was dark outside?

A Yes.

Q And it was dark in your cruiser?

A Yes.

Q And he had been in the dark for a period of probably fifteen minutes from the time he got in his car until you stopped him, put him through tests and got him back to the police station?

A I would say, yes.

Q And you walked in there with him and they began taking pictures?

A Yes.

Q And as they were taking pictures, it was then you [R-39] asked him to perform certain tests?

A Yes.

* * *

[R-41, Line 11]

Q And at the time you were putting this man through the test, there was no question in your mind but what he was under arrest and you intended to charge him with DWI?

A Definitely.

Q And the purpose of giving him these tests was not to

determine whether he was under the influence of alcohol but merely to get evidence to convict him?

* * *

A Yes, sir, that is the way of getting evidence. [R-45, Line 6]

Q And what other test did you have him perform?

A The test of the coin, and I got handwriting—he wrote his name and address down for me.

Q What were those coin tests?

A You put a series of coins—they can be any number, usually four or six. I put down four, and asked him to pick them up.

Q Where did you put the coins?

A On the floor.

Q Right down there?

A Yes, sir.

Q And what did you ask him to do?

A Just to bend down, pick one up, place it on the desk with his head up, and bend down and get another one and place them in a straight line.

Q On the desk?

A On the desk.

Q So each time he came down, he had to come up with one?

A Yes, sir.

Q And he'd have to raise up to put it on the desk and [R-46] then he'd have to bend down like that and pick up one and bring it back to the desk and then go down again?

A Yes, sir.

Q Why did you do that?

A Like I said, we've had a little schooling and it all goes back to the inner ear balance. A way of checking the balance.

Q In other words, the purpose was not to have this man identify whether it was heads or tails on the coins, was it?

A It is, but I didn't tell him that.

Q Well, if you wanted a person to identify whether it was heads or tails, couldn't you just put them on the table and ask him to pick out certain ones and move them over there?

A No, it has to be done on the floor, for him to go down, come up for a check of the balance then.

Q I realize that you do it that way but as far as identification of coins, it would be easier and simpler to just pick them out on the table where the person is sitting or standing?

A If the purpose was to pick out heads or tails, yes.

Q Isn't it the purpose of the tests to get the man's head first elevated and then down at a low level and then get him back and forth like that four or six times?

A Yes.

Q And this is not a normal maneuver for the body to do, [R-47] is it?

A I wouldn't see anything abnormal about it, bending down and picking something up.

Q In other words, have that man do this four or six times quickly like that, while you are watching?

A He does it in his own time. He's not told to do it quickly.

Q But all the time you are taking movies of him?

A Yes, sir.

* * *

[R-48, Line 4]

Q What other tests did you do?

A Well, there is the walking which you went through, the balance, your index finger to your nose.

Q Now that's done with the arm extended?

A Yes, sir.

Q And then they are to take their index finger on one hand and bring it in?

A Touch their nose.

Q Touch their nose, take the other hand and bring it in like that and they're told to touch their nose?

A No, you tell them to take either the left or the right and do it several times, and then do it with the other hand.

Q So there are several attempts with one hand and then with the other?

A Yes.

Q Do you have them with their eyes open or closed?

A The eyes are closed.

* * *

[R-50, Line 5]

Q Then what did you do?

A Well, after that was the coins, and then I believe I just had him to set down and we started on this form.

Q What did you have him sign?

A Just a specimen of handwriting there—it is on the form. Just his name and address.

Q And I guess you had him sign some other things, too?

A No, sir, I did not.

Q That is the only thing you had him sign?

A Yes.

Q Then when was the Breathalyzer given?

A That was during, when I was filling out the back of the questioning of this form, Officer DeBrosse had the machine ready and he went up and blew for the Officer, and I waited on him.

Q And it was at this time for the first time that you told him he didn't have to do this?

A No, sir, I told him when he was being booked.

Q Then after all these were done it was then that he was advised that he had the right to an attorney?

A As he was being booked, yes.

[R-51]

Q After all these tests?

A Yes, sir.

Q The questions and so forth?

A Yes.

EXCERPTS FROM THE RECORD OF THE CROSS-EXAMINATION OF OFFICER DEBROSSE

[R-66, Line 25]

Q Did you at any time while you were there hear any [R-67] officer advise him as to his rights to an attorney?

A Yes, he was told he could call an attorney.

Q When?

A The procedure is the time they are being booked.

Q You tell them as they are being booked, after they have gone through all these tests?

A Yes, they have, usually gone through that procedure, yes.

Q So the first time this man was ever advised as to his rights to an attorney was after you had taken movies, after you put him through physical tests, after you put him through the Breathalyzer and after you filled out the questionnaire?

A This has been the procedure.

Q And he was already under arrest and charged with DWI before you performed any of these tests?

A Yes, I suppose he was.

Q So the sole purpose for performing these tests is to try to bolster your case against him?

A That's the procedure.

Q He was already charged with DWI and was under arrest?

A Yes.

Q And then you, after doing those things, then you went through all these tests and then later one of the officers advised him he had a right to call a lawyer?

A Yes.

* * *

The foregoing testimony makes it clear that the accused was not given the constitutional safeguards required by *Miranda*. One Ohio Court of Appeals says it is not necessary, *Columbus v. Hayes*, 9 Ohio App. 2d 38, confining their pronouncement to the following:

> "The punishment which may be imposed for the offense of operating a vehicle while under the influence of alcohol is not, at present, sufficient to bring that offense within the constitutional limitations of custodial interrogation under Miranda vs. Arizona (1966), 384 U.S. 436."

A second Ohio Court of Appeals holds that *Miranda* does apply to such cases, *Piqua* v. *Hinger*, 13 Ohio App. 2d 108, and supplies reasoning as follows:

> "Unfortunately, the opinion in the Hayes Case states no reasons for its conclusion, and we have encountered some difficulty in recognizing why constitutional rights are any less sacred in misdemeanor cases than in felony cases.
>
> "The distinction between misdemeanors and felonies is found in the penalty provisions of the criminal law, and this distinction, which is based entirely upon

the place of possible confinement, has little or nothing to do with the actual trial of a criminal case. How then could this distinction affect the basic question of fairness which is an inherent quality of every constitutional safeguard?

"The Constitution is, of course, aloft from administrative inconvenience, and we perceive no other valid reason for lowering its protective shield during the trial of misdemeanor cases. The onerous prospect of confinement in the county jail rather than the state penitentiary is hardly an adequate substitute for a fair trial, and, as a practical matter, it is well known that the actual punishment for many felonies is less harsh and severe than the penalties which may be inflicted in some misdemeanor cases.

"We have no sympathy for the defendant in this case. Traffic problems being as they are, he has been charged with a very serious crime. But the defendant is not a criminal in the usual sense. His occupation is that of a paper hanger, and he should be entitled, at least, to the same constitutional protection afforded daily to hardened criminals."

With conflicting Court of Appeals decisions, judges, lawyers, law enforcement officers and much of the public, look to the Supreme Court of Ohio to resolve the issue. The best summary of the dilemma in which we now find ourselves in Ohio is composed of the opening and closing sentences of the opinion of the Supreme Court of Ohio, as follows:

First Sentence:

"The question raised in this case is whether the ruling in Miranda is applicable in misdemeanor cases."

Closing Sentence:

"Accordingly, we do not reach the question of the

applicability of Miranda to misdemeanor cases, and express no opinion thereon."

To eliminate doubt and confusion, we feel this important issue should be resolved — for the benefit of the many interested people throughout the country. It becomes even more critical for uniform law enforcement when the court of last resort of one of the most populous states refuses to pass on it.

While the foregoing is the issue of most universal interest, the more critical one to this petitioner is the clearly erroneous application of the *Schmerber case, Schmerber* v. *California,* 384 U.S. 757, to the facts in this case. The *Schmerber case,* if its full import is evaluated, is authority for upholding the reversal of the conviction in this case. The majority opinion in the *Schmerber case* includes an important and significant qualification, as follows:

> "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communication' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.
>
> "Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence', for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to

evoke the spirit and history of the Fifth Amendment.

* * *

"In the present case, however, no such problem of application is present. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone.

"Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissable on privilege grounds."

The testimony upon trial of this case, excerpted and quoted hereinabove, is replete with "physical evidence" extracted from the defendant in such a way as to make them "essentially testimonial". This would include the taking of movies upon entering the police station and filming him while they had him perform certain physical tests, such as walking a line, bending over and picking up coins, and touching his nose. In addition, while completing a form for later use at trial they asked him certain questions to test his state of mind. Furthermore, they obtained a specimen of his handwriting. These things were clearly "some communicative act or writing" falling within the qualification of the *Schmerber case* majority opinion.

With basic and academic reasoning, and with the use of "fundamental fairness", if the Supreme Court of Ohio did not wish to pass on the applicability of *Miranda* to misdemeanors, we believe it should agree that the facts in this case make it clearly distinguishable from the blood test of *Schmerber*.

In this case we have many of the "communicative acts" contemplated by the qualifications of the opinion in *Schmerber*. These include the filming of the accused while he is performing certain unnatural physical contortions, the securing of a specimen of his handwriting, obtaining oral answers ("utterances") to questions designed to test his reflexes and his orientation, and the blowing of his alveolar air into a machine.

We urge that had the Supreme Court of Ohio fully considered, and correctly understood, the reasoning of the *Schmerber case,* the inevitable conclusion would be that the foregoing tests elicited "responses which are essentially testimonial."

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued by this court, directed to the Supreme Court of Ohio, to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed by this court.

Respectfully Submitted,

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